



In the Matter of:

**ADMINISTRATOR,
WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT
OF LABOR,**

ARB CASE NO. 01-011

ALJ CASE NO. 99-CLA-18

DATE: November 27, 2002

PLAINTIFF,

v.

LYNNVILLE TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

**Steven J. Mandel, Esq., Paul L. Frieden, Esq., Claire Brady White, Esq., U.S.
Department of Labor, Washington, DC**

For the Respondent:

**John R. Sandre, Esq., Michael J. Carroll, Esq., Coppola, Sandre, McConville & Carroll,
P.C., West Des Moines, Iowa**

FINAL DECISION AND ORDER

Pending before the Administrative Review Board (“Board”) is Respondent Lynnville Transport’s petition for review of a Department of Labor Administrative Law Judge’s Decision and Order (“D. & O.”) finding that Lynnville violated child labor provisions of the Fair Labor Standards Act of 1938 (“FLSA”), as amended, 29 U.S.C.A § 212 (West 1998) and implementing regulations, 29 C.F.R. Part 570, and approving the assessment of civil money penalties. Having considered the applicable law and the submissions of the parties, we affirm the Administrative Law Judge’s Decision and Order.

At all relevant times, Martin Vander Molen and his wife, Betty, owned and operated Lynnville Transport, a closely-held corporation based in Sully, Iowa. D. & O. at 2-3. Using trailers, Lynnville transported livestock, owned largely by other individuals and companies, across state lines. *Id.*

In January 1998, a Wage and Hour investigator, Ronald Mease, determined that Lynnville had violated the FLSA's minimum wage, overtime and child labor provisions during the previous two years. D. & O. at 3-4.¹ In general, the child labor violations, which Mease identified, consisted of the following: 1) failure to record birth dates of certain employed minors, (2) failure to comply with the permissible child labor maximum weekly work hours and time of day restrictions for 14- and 15- year-olds, (3) failure to comply with the prohibition against hiring minors under 14 years of age, and employing those underage minors to work times and hours not permitted, (4) employing minors under the age of 16 in violation of the prohibition against their employment in occupations in connection with transportation, and (5) permitting employed minors under the age of 18 to operate a skid loader, which is a specifically prohibited hazardous occupation under Hazardous Order No. 7 promulgated by the Secretary, 29 C.F.R. § 570.58 (2002). D. & O. at 4.

Mease, at the conclusion of his investigation, completed a Child Labor Civil Money Penalty Report (Form WH-266) to compute the recommended civil money penalties to be assessed. Hearing Transcript (H.T.) at 127. Donald Chleborad, the District Director, reviewed Mease's findings and the Form WH-266. He reduced the number of violations reported on the form, finding some to be duplicative and others to be *de minimis* and ultimately approved a penalty assessment of \$17,125.00. D. & O. at 5; H.T. 129-136.

Before the Administrative Law Judge (ALJ), Lynnville conceded all of the violations except the hazardous occupation-skid loader violation. D. & O. 7-8; Respondent's Post-Hearing Brief ("Resp. br.") at 1. Lynnville also contested the amount of the civil money penalty. D. & O. at 10.

Lynnville did not dispute that minor employees under the age of 18 operated the skid loader and that the skid loader the minor employees operated is a "high-lift truck."² Resp. br. at 4. However, Lynnville argued that because it was unnecessary for the minors to use the skid-loader for high-lifting or hoisting during the course of their employment duties, "it was never used in a way that violates the regulation." *Id.* In support of this argument, Lynnville relied on the fact that 29 C.F.R. § 570.58(b)(5), which defines "high-lift truck" specifically excludes from the definition "low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of material." In a well-reasoned opinion, the ALJ rejected this argument, finding that the operation of a high-lift truck by a minor is a *per se* violation of the regulation and that "the operation of such a truck by minors is precluded by the hazardous order even if the minors' use of the equipment was consistent with that normally performed by low-lift trucks." D. & O. at 9.

In regard to the civil money penalty assessment, Lynnville argued that the District Director's use of the Form WH-266 schedule to calculate the penalty violated 29 C.F.R. § 579.5, the regulation directing how the amount of the penalty is to be determined, because the schedule does not take into account the factors that the regulation specifies must be considered in assessing the penalty. Resp. br. at 7-8. Lynnville also asserted that the use of the schedule violates due process because it sets a minimum penalty for violations regardless of any

¹ Lynnville paid the back wages for the minimum wage and overtime violations and the Wage and Hour Division assessed no penalties for those violations. D. & O. at 4.

² Hazardous Order No. 7 specifically prohibits minors between the ages of 16 and 18 years of age from operating, among other devices, a high-lift truck. 29 C.F.R. § 570.58. This prohibition also applies to minors between 14 and 16 years of age. 29 C.F.R. § 570.33(e).

mitigating circumstances. *Id.* at 9. Finally, Lynnville maintained that the penalty should be vacated because Mease informed Lynnville that no penalty would be assessed if Lynnville complied fully with the child labor provisions in the future. *Id.* at 9-10.

The ALJ properly rejected Lynnville’s arguments. The ALJ found that the District Director, employing the Form WH-266 schedule had taken into account “many” (or “most”) of the factors set forth in 29 C.F.R. § 579.5(c), (d). D. & O. at 14.³ The ALJ conducted an independent evaluation of the factors⁴ and concluded:

I find that the district director, through the use of the Child Labor Civil Money Penalty Report, did take into account many of the factors required by the regulations. Those he did not take into account, I conclude, do not affect my decision. I see no reason to depart from the penalties recommended by the district director, as these seem reasonable under the circumstances, and are sufficient to accomplish their purpose of punishing violators of the child labor laws and encouraging future compliance with those laws. Therefore, I sustain the civil money penalties as assessed by the district director in full.

*Id.*⁵

The ALJ also determined that the evidence was conflicting as to whether the investigator assured Lynnville’s owners that the Division would assess no penalties if the owners guaranteed future compliance. However the ALJ found that the evidence tended to support the

³ In *Administrator v. Thirsty’s Inc.*, ARB No. 96-143, ALJ No. 94-CLA-65, (ARB May 14, 1977), *aff’d sub nom.*, *Thirsty’s, Inc., v. United States Dep’t of Labor*, 57 F. Supp. 2d 431 (S.D. Tex. 1999), we held that the Form WH-266 schedule “is an appropriate tool to be used by a field Compliance Office to recommend penalties through the enumeration and determination of the gravity of factual violations.” Slip op. at 5. We further emphasized, “It is important to note that the initial determination of the investigator on Form WH-266 is subject to review and may be modified by the District Director.” *Id.* In this case the ALJ, based upon District Director Chleborad’s testimony found, “[I]t is obvious, however, that the district director had no discretion because he was required to follow the instructions set forth in the [WH-266] penalty report.” D. & O. at 11-12. However, it is unnecessary for us to reconcile this apparent inconsistency, in this case, because as we discuss, *infra*, the ALJ independently reviewed the evidence and evaluated the required statutory and regulatory factors before affirming the Administrator’s penalty assessment. See *Administrator v. Elderkin*, ARB Nos. 99-033, 99-048, ALJ No. 95-CLA-31, slip op. at 13 (ARB June 30, 2000).

⁴ D. & O. at 11-14.

⁵ The Administrator states in her brief that she does not “endorse” the ALJ’s statement that “one of the purposes of civil money penalties is ‘punishing violators.’” Statement of the Acting Administrator in Opposition to Petition for Review at 18 n.22. We agree with the Administrator that civil money penalties are not a form of punishment, in the criminal sense. However, the Supreme Court has recognized that “the imposition of . . . [civil] money penalties . . . will deter others from emulating petitioners’ conduct, a traditional goal of criminal punishment.” *Hudson v. United States*, 522 U.S. 93, 105 (1977).

Administrator's claim that the agreement to assess no penalties only extended to the minimum wage and overtime violations and not to the separate child labor violations. D. & O. at 14.⁶

Before the Board, Lynnville essentially repeats the same arguments it raised in its brief to the ALJ. Respondent's Appeal Brief at 7-17. In particular, Lynnville continues to argue that the District Director's use of the Form WH-266 schedule to calculate the initial civil money penalty violates 29 C.F.R. § 579.5 and due process. However this argument completely overlooks the facts that the ALJ properly recognized that he was not bound by the Form WH-266 schedule and that he conducted an independent review and consideration of the 29 C.F.R. § 579.5 factors.

We have conducted a *de novo* review of the ALJ's D. & O. See *Administrator v. Elderkin*, slip op. at 5. Finding no reason to depart from the ALJ's cogent opinion, which we conclude is fully supported by the facts and relevant law, we adopt and attach it. See, e.g., *Kelley v. Heartland Express, Inc.*, ARB No. 00-049, ALJ No. 99-STA-29, slip op. at 3 (ARB Oct. 28, 2002). See also *Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 355 (1st Cir. 1994) ("When a trial court produces a lucid, well-reasoned opinion that reaches an appropriate result, we do not believe that a reviewing court should write at length merely to put matters in its own words."). The ALJ's Decision and Order is **AFFIRMED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁶ The ALJ also stated that that the resolution of this issue was not relevant to the disposition of the penalty issue in this case because, "[he] only ha[d] jurisdiction to determine whether the penalties assessed are reasonable given the gravity of the violations." D. & O. at 14. Given the ALJ's well-supported finding that Vander Molen's belief that the Department would not assess civil money penalties was mistaken, it is unnecessary for us to consider, and we do not address, the ALJ's assertion that he did not have "jurisdiction" to consider whether, in any event, the Department could be estopped from assessing a penalty based upon the unauthorized assertion by an employee (H. T. 108). We do note however, that Lynnville has cited no legal authority in support of its position that the Department should be estopped from assessing the penalty. Instead, Lynnville simply argues, "[T]he employer should not be further penalized by the Department's conduct and the deal that the employer **believed** had been struck should be allowed to stand." Respondent's Appeal Brief at 16-17 (emphasis supplied).